2001 BNH 014 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 00-10581-JMD
Chapter 13

Eric T. Schultz and
Louise M. Schultz,
Debtors

Eric T. Schultz and
Louise M. Schultz,
Plaintiffs

v. Adv. No. 00-1072-JMD

AMEJRE, LLC and
Associates Housing Finance, LLC,
Defendants

Associates Housing Finance, LLC,
Third-Party Plaintiff

v.

Priority Title Services, Inc. and
Richard F. Askins, Esq.,
Third-Party Defendants

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MEMORANDUM OPINION

I. BACKGROUND

The Debtors filed a Chapter 13 bankruptcy petition on March 3, 2000 and an adversary proceeding against AMEJRE, LLC ("AMEJRE") and Associates Housing Finance, LLC ("AHF") on June 1, 2000. The Debtors filed an amended complaint in the adversary on October 16, 2000 asserting three counts against AHF and AMEJRE. In Count I, the Debtors seek a determination as to AHF's secured status. In Count II, the Debtors allege that AHF and AMEJRE violated the automatic stay, specifically 11 U.S.C. §§ 362(a)(4) and (a)(5) by executing, recording, and attempting to deliver a deed to the Debtor's manufactured housing unit[1] postpetition. In Count III, the Debtors claim that AHF violated the automatic stay, specifically 11 U.S.C. §§ 362(a)(3) and (a)(6), by insisting that the Debtors pay AHF funds being held in escrow in accordance with a state court stipulation.

AMEJRE filed an answer to the amended complaint asserting that Priority Title Services, Inc. ("Priority) prepared the deed to the manufactured home postpetition and that AMEJRE executed the deed on March 24, 2000 as part of its contractual obligation to convey good title to the manufactured home to the Debtors. AMEJRE further stated that the Debtors are estopped from denying ownership of the manufactured home having accepted possession and control of the home and having placed it upon their land. AMEJRE denied that any of its actions violated the automatic stay.

AHF filed an answer to the amended complaint asserting that no deed was necessary to effectuate transfer of title to the Debtors, or alternatively, that Priority erred in not recording the deed timely. With

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[1] RSA 674:31 defines manufactured housing as follows:

> As used in this subdivision, 'manufactured housing' means any structure, transportable in one or more sections, which, in the traveling mode, is 8 body feet or more in width and 40 body feet or more in length, or when erected on site, is 320 square feet or more, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to required utilities, which include plumbing, heating and electrical heating systems contained therein. Manufactured housing as defined in this section shall not include presite built housing as defined in RSA 674:31-a.

See In re Smith, 176 B.R. 298, 300 (Bankr. D.N.H. 1994).

respect to the escrow fund allegations, AHF indicated that the funds represent regular monthly mortgage payments due AHF by the Debtors that were being held in escrow pending resolution of state court litigation which, according to AHF, was resolved in AHF's favor on February 15, 2000. AHF indicated that, on March 30, 2000, when AHF contacted the Debtors, it was merely asking what were the Debtors' intentions regarding the past escrowed mortgage payments and future mortgage payments.

On October 13, 2000, AHF filed a third-party complaint against Priority asserting state law claims for breach of fiduciary duty, breach of contract, negligence, and indemnification. After a pretrial hearing on the third-party complaint on November 20, 2000, the Court entered an order suspending all previously established deadlines regarding discovery and pretrial procedures, and the Court set a further pretrial hearing for January 17, 2001. Prior to the January 17, 2001 hearing, Richard Askins, Esq. was added as an additional third-party defendant.

On November 24, 2000, AMEJRE filed a motion for summary judgment asserting that no issues of material fact exist with respect to the Debtors' claims against it and that judgment on Count II should be granted in AMEJRE's favor. AMEJRE contends that none of its actions with respect to the execution and delivery of the deed to the manufactured home violated section 362(a)(4) of the Bankruptcy Code as AMEJRE did not take any actions "to create, perfect or enforce any lien against property of the estate" nor did its actions violate section 363(a)(5) of the Bankruptcy Code as AMEJRE did not take any actions "to create, perfect or enforce against property of the debtor any lien to the extent such lien secures a claim that arose before the commencement of the case." AMEJRE contends that "[t]he execution of a deed by non-creditor is not a collection activity, is not harassment, and is not a violation of the automatic stay provision."

The Debtors filed an objection to AMEJRE's motion. They assert that there are material issues of fact regarding whether AMEJRE was aware that a deed had not been executed or recorded prepetition and what AMEJRE's purpose was in executing and recording the deed. The Debtors take the position that by executing and delivering the deed AMEJRE permitted AHF to perfect its lien.

The Court held a hearing on AMEJRE's motion for summary judgment on January 17, 2001 at which time AHF indicated that it would filing a motion for partial summary judgment on grounds related to those set forth in AMEJRE's motion. Accordingly, the Court took AMEJRE's motion under advisement indicating that it would rule on the motions for summary judgment together.

AHF filed its motion for partial summary judgment on January 31, 2001 seeking a ruling by the Court that its mortgage is secured by the Debtors' land located on Winter Street in Claremont as well as the improvements thereon including the manufactured housing unit that the Debtors purchased from AMEJRE. Essentially, AHF seeks summary judgment as to Count I of the amended complaint.

The Debtors filed an objection to AHF's motion stating that title to the unit was not transferred to them because (1) no deed was executed in accordance with RSA 477:44; (2) even if a deed was not required, the Debtors rejected and revoked any acceptance of the manufactured home within a reasonable time; and (3) equitable estoppel does not prevent them asserting that they lack legal title to the unit. The Court held a hearing on AHF's motion for partial summary judgment on March 9, 2001 at which the Court took AHF's motion under submission.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. DISCUSSION

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, a summary judgment motion should be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "Genuine," in the context of Rule 56(c), "means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party." Rodriguez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1st Cir. 1993) (quoting United States v. One Parcel of Real Property, 960 F.2d 200, 204 (1st Cir. 1992)). "Material," in the context of Rule 56(c), means that the fact has "the potential to affect the outcome of the suit under applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). Courts faced with a motion for summary judgment should read the record "in the light most flattering to the nonmovant and indulg[e] all reasonable inferences in that party's favor." Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994). The Court finds there are no genuine issues of material fact in dispute as the parties agree to the following facts.

On October 17, 1998, AMEJRE and the Debtors entered into an agreement pursuant to which AMEJRE agreed to sell, and the Debtors agreed to buy, a manufactured housing unit (the "Purchase Agreement"). On or about October 20, 1998, the Debtors applied to AHF for a loan to (1) refinance the existing mortgage on their land on Winter Street in Claremont, New Hampshire; (2) finance their purchase of the manufactured housing unit; (3) finance the installation of the unit; and (4) finance related improvements to the Debtors' land. On December 10, 1998, the Debtors signed a note and a mortgage along with a manufactured housing unit rider. At the time of the loan closing, a deed to the unit was either executed and misplaced or was not presented for AMEJRE to sign.

On or about March 8, 1999, AMEJRE delivered the manufactured home to the Debtors' land in Claremont. On or about that same day, AMEJRE received payment of the purchase price in full for the unit. AHF fully disbursed all loan proceeds by March 12, 1999. AHF represents that it disbursed the loan

proceeds in reliance upon the mortgage and the manufactured housing unit rider and on the understanding that the mortgage covered the land and all improvements thereon including the unit.

According to the Debtor, the setup of the unit was incomplete and problematic. On April 8, 1999, the Debtors forwarded a letter to AMEJRE requesting that it repair various defects to the unit. On May 12, 1999, the Debtors' attorney sent a letter to AHF describing the unit's various problems and indicating that the unit was beyond repair and it might have to be removed. The Debtors did not provide any evidence in support of its objections to the motions, by way of affidavit or otherwise, that would support its position that they rejected or revoked their acceptance of the unit shortly after its installation.

The Debtors filed their Chapter 13 bankruptcy petition on March 3, 2000. On or about March 22, 2000, Priority prepared a manufactured housing warranty deed and sent it to AMEJRE for execution. On or about March 24, 2000, AMEJRE executed the deed and returned it to Priority. The deed was ultimately recorded at the registry of deeds.

The Purchase Agreement provides as follows with respect to title to the unit:

> 2. Title. Title to the unit purchased will remain in [the seller] until the agreed upon purchase price is paid in full in cash, or [the buyers] have signed a retail installment contract and it has been accepted by a bank or finance company, at which time title passes to [the buyers] even though the actual delivery of the unit purchased may be made at a later date.

The mortgage indicates that security for AHF's loan to the Debtors included the real estate located on Winter Street in Claremont "TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property." The manufactured housing unit rider provided that the security consisted of the real property located on Winter Street "[t]ogether with the Manufactured Housing Unit," which was specifically described in the rider. The rider further provided that the "[b]orrower(s) covenant and agree that they will comply with all State and local laws and regulations regarding the affixation of the Manufactured Housing Unit to the real property described herein including, but not limited to, surrendering the Certificate of Title (if required) and obtaining the requisite governmental approval and accompanying documentation necessary to classify the

Manufactured Housing Unit as real property under State and local law" and "[i]n the event that state or local law does not provide for a surrender of title, Borrower grants Lender a security interest in the Manufactured Housing Unit and shall execute such documents as Lender may require to evidence Lender's security interest therein."

The Debtors argue that AMEJRE was required, as the owner and seller of the manufactured home, to execute and deliver a deed to the unit in the form specified in RSA 477:44 in order to legally transfer title to them. RSA 477:44, entitled "Buildings; Manufactured Housing," provides:

> I. APPLICATION OF REAL ESTATE LAWS. Buildings situated on land not belonging to the owners of the buildings shall be deemed real estate for purposes of transfer, whether voluntary or involuntary, and shall be conveyed, mortgaged or leased, and shall be subjected to attachment, other liens, foreclosure and execution, in the same manner and with the same formality as real estate.
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> II. MANUFACTURED HOUSING. Manufactured housing, as defined by RSA 674:31, shall be deemed a building for the purpose of paragraph I when such manufactured housing is placed on a site and tied into required utilities. Any deed conveying manufactured housing or evidencing its relocation within this state shall be substantially in the form provided in subparagraphs (a) and (b). If a deed for any manufactured housing is recorded in the registry of deeds of one county of this state and if such manufactured housing is relocated to another site in that county or to a site in another county of this state, a deed evidencing the change of location shall be recorded in the registry of deeds of the county in which it was originally located and a duplicate original shall also be recorded in the registry of deeds of the county to which it was relocated. If such manufactured housing is relocated to a site outside of this state, a statement evidencing the change of location substantially in the form provided in subparagraph (c) shall be recorded in the registry of deeds of the county in this state in which it was previously located. An attachment, lien or other encumbrance on manufactured housing, when properly created and recorded as required by law, shall continue to be enforceable until released or discharged notwithstanding the relocation of the manufactured housing within or outside of this state.
> . . .
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> III. INITIAL TRANSFER OF TITLE TO MANUFACTURED HOUSING. A deed, substantially in the form prescribed by subparagraphs II(a) and (b), duly executed and delivered, shall be required to transfer title to any manufactured housing in a transaction occurring prior to connection of such manufactured housing to the required utilities.
> . . .

RSA 477:44. "In interpreting a statute, we 'cannot read words into it which the legislature did not see fit to insert.'" Appeal of CNA Ins. Co., 143 N.H. 270 (1998) (quoting Gregory v. State, 117 N.H. 62, 63 (1977)). "When construing a statute, 'we ascribe the plan and ordinary meaning to words used.'" Id.

Here, the Debtors focus on one provision in the statute, subsection III, and argue that it stands for the proposition that a deed is required to transfer title to all manufactured housing units. See RSA 477:44(III). While RSA 477:44(III) states that a deed shall be required to transfer title to any manufactured housing in a transaction occurring prior to connection of such unit to the required utilities, the Debtors ignore the first paragraph of the statute which makes clear that RSA 477:44 is dealing with manufactured housing units "situated on land not belonging to the owners of the buildings." The Court finds nothing in the statute requiring that a deed be executed and delivered in order to transfer title to a manufactured home where the unit is being placed on real estate owned by the purchaser of the manufactured home. Rather, RSA 477:44 addresses the issue of whether manufactured homes affixed to land owned by another should be treated as real estate. It was unnecessary to address in the statute the issue of whether a manufactured home placed on real estate owned by the purchaser should be treated as real estate because New Hampshire common law provides that personalty that is incorporated into realty becomes part of the real estate and is then subject to the statutory and common law rules regarding conveyancing and mortgages.

"A chattel loses its character as personalty and becomes a fixture and part of the realty when there exists an actual or constructive annexation to the realty with the intention of making it a permanent accession to the freehold, and an appropriation or adaptation to the use or purpose of that party of the realty with which it is connected." New England Telephone and Telegraph Co. v. City of Franklin, 141 N.H. 449, 453 (1996) (emphasis omitted) (quoting The Saver's Bank v. Anderson, 125 N.H. 193, 195 (1984)). See also Carkin v. Babbitt, 58 N.H. 579, 579 (1879) ("Things moveable and personal in their nature, when fitted and applied to use as part of the realty, and necessary to its beneficial enjoyment, may be regarded as incident to it and become an essential part of it. . . . It is by adaption and use that chattels acquire this character.") (quoted in Automatic Sprinkler Corp. of Am. v. Marston, 94 N.H. 375, 376 (1947)). A determination of whether an item of property is properly classified either as personalty or as a fixture turns of several factors, including:

1. The item's nature and use;

2. The intent of the party making the annexation;

3. The degree to which the item is specially adapted to the realty;

4. The degree and extent of the item's annexation to the realty; and

5. The relationship between the realty's owner and the person claiming the item.

New England Telephone, 141 N.H. at 453 (citing The Saver's Bank, 125 N.H. at 195; Automatic Sprinkler Corp., 94 N.H. at 376; Graton & Knight Co. v. Company, 69 N.H. 177, 178 (1897); Dana v. Burke, 62 N.H. 627, 629 (1883); Wadleigh v. Janvrin, 41 N.H. 503, 518 (1860)). "The central factors are 'the nature of the article and its use, as connected with the use' of the underlying land . . . because these factors provide the basis for ascertaining the intent of the party who affixes or annexes the item in question." Id. (citations omitted). "[I]f a chattel becomes an intrinsic, inseparable and untraceable part of the realty, it is deemed a fixture regardless of the intent of the parties." The Saver's Bank, 125 N.H. at 195.

Here, the parties intended the manufactured home to become part of the real estate that the Debtors already owned. The Debtors had a foundation dug for the unit and they had the home placed upon it and connected to utilities. It is evident that the parties expected the unit to be permanently affixed to the real property much in the same way a new home, constructed on the site, would have been incorporated into the real estate. See Laro v. Leisure Acres Mobile Home Park Assocs., 139 N.H. 545, 548 (1995) (citing RSA 477:44(I) and stating that "the distinction between personal property and a mobile home is apparent"); Pleasant Valley Campground, Inc. v. Rood, 120 N.H. 86, 88 (1980) (suggesting, although not determining, that a mobile home is a fixture and thus part of the real estate). See also Fuqua Homes, Inc. v. Evanston Bldg. & Loan Co., 370 N.E.2d 780, 784 (Ohio Ct. App. 1977) (stating that once the manufactured housing was attached permanently to the foundation the resulting structure became part of the real estate). There have been no allegations by the Debtors either in the pleadings or in Mr. Schultz's affidavit that the Debtors intended to treat the unit as personalty. Therefore, the Court finds that the unit became part of the real estate and title passed under applicable law and in accordance with the terms of the Purchase Agreement

upon delivery to the Debtors' site, connection with utilities and payment of the purchase price to AMEJRE in March 1999.

Once personalty becomes part of the real estate the fixture will pass by conveyance of the realty as an incident to it. See New England Telephone, 141 N.H. at 453-54; Dana, 62 N.H. at 629 ("Things movable and personal in their nature may, by intentional adaption, annexation, and use, become an essential part of the realty, and pass by a conveyance as an incident to it, as the keys of a house pass by a conveyance of the house."); Despatch Line of Packets v. Bellamy Man. Co., 12 N.H. 205 (1841) ("Machines, and other articles essential to the occupation of a building, or the business carried on in it, and which are affixed or fastened to the freehold, and used with it, partake of the character of real estate, become part of it, and pass by a conveyance of the land.").

The Debtors object to the motions for partial summary judgment based upon their argument that their rejection or revocation of acceptance of the manufactured housing unit is a disputed issue of material fact. The Court rejects this argument. The New Hampshire Supreme Court has indicated that the classification of a chattel, either as personalty or a fixture, may be dependent upon the relationship between the owner of the realty and the person who claims an interest in the chattel. See The Saver's Bank, 125 N.H. at 195. Accordingly, where chattels were installed in a seller's building by a purchaser before the closing, but the parties did not intend to make the chattels a permanent accession to the realty in the event the purchase and sale agreement did not close, the chattels were personalty and the seller's mortgagee had no claim to the items. After default by the seller, the chattels were personalty belonging to the purchaser if the items could be removed from the realty without material damage to the premises. See id. at 196. However, once an item becomes the property of a mortgagor, either by contract or accession, the mortgagee under a pre-existing mortgage will have a claim on the item. See id. "Fixtures attached to the realty after the execution of a mortgage of it become a part of the mortgage security, if they are attached for the permanent improvement of the estate and not a temporary purpose, or if they are such as are regarded as

permanent in their nature, or if they are so fastened or attached to the realty that their removal would be an injury to it." Langdon v. Buchanan, 62 N.H. 657 (1883).

In this case, it is undisputed that the parties intended the manufactured housing unit to become a permanent part of the Debtors' real estate once it was moved onto the premises. It is undisputed that AHF relied on the unit when considering the Debtors' mortgage application, closing the mortgage loan on December 10, 1998 and making the final mortgage disbursement to AMEJRE on or before March 12, 1999. See The Saver's Bank, 125 N.H. at 196 (suggesting that the result in that case would have been different if the mortgagee had relied on the presence of the items when taking the mortgage). Therefore, in accordance with the terms of the mortgage and the provisions of New Hampshire law, the unit became part of the Debtors' realty and subject to AHF's mortgage lien in March 1999.

To the extent that the Debtors argued that they rejected or revoked their acceptance of the manufactured home, AHF's mortgage lien had already attached to the unit before any rejection or revocation might have occurred. As a result, AHF continues to hold its mortgage against the property regardless of whether the Debtors held title to the unit on the day they filed their Chapter 13 petition.

V. CONCLUSION

The Court concludes that it was unnecessary for AMEJRE to execute and deliver a deed to the Debtors to transfer title of the manufactured home. At the moment the unit was affixed to the Debtors' land in Claremont in March 1999, it became part of the real estate. In accordance with the terms of its mortgage, AHF's security interest in the unit attached and was perfected at that time and AHF's lien in the manufactured home continued and was in effect at the time the Debtors filed their petition. The postpetition actions taken by AMEJRE and/or AHF in executing and delivering a deed did not create, perfect, or enforce AHF's lien. Therefore, AMEJRE and AHF's action did not violate the stay. Accordingly, AHF's motion for partial summary judgment on Count I and AMEJRE's motion for summary judgment on Count II will be granted.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 2nd day of April, 2001, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge